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10 CAVE CONSULTING GROUP, LLC,
11 Plaintiff(s),
12 v.
13 OPTUMINSIGHT, INC.,
14 Defendant(s).

Case No. [5:11-cv-00469-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 139, 148

15 Plaintiff Cave Consulting Group, LLC, ("CCGroup" or "Plaintiff") brings the instant
16 action for patent infringement against Defendant OptumInsight, Inc., f/k/a Ingenix, Inc.,
17 ("OptumInsight" or "Defendant"). Presently before the Court are the parties' cross-motions for
18 summary judgment.¹ Having carefully reviewed the parties' briefing and considered the parties'
19 arguments from the hearing on December 12, 2014, the Court GRANTS in part and DENIES in
20 part OptumInsight's motion for summary judgment, and DENIES CCGroup's motion for
21 summary judgment for the reasons explained below.

22 **I. BACKGROUND**

23 CCGroup is a California corporation with a principal place of business in San Mateo,
24 California.² OptumInsight is a Delaware corporation with a principal place of business in

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27 ¹ Dkt. Nos. 139, 148.
28 ² Dkt. No. 89 at 2.

1 Minnesota.³ CCGroup is the owner by assignment of all right, title and interest in the U.S. Patent
2 No. 7,739,126 (“the Cave ‘126 Patent” or “the ‘126 Patent”).⁴ OptumInsight is the owner by
3 assignment of all right, title, and interest in the U.S. Patent Nos. 7,222,079 (“‘079 Patent”) and
4 7,774,252 (“‘252 Patent”) (collectively “the Seare Patents”).⁵ CCGroup and OptumInsight both
5 develop and market software and services used to evaluate various parameters of healthcare
6 delivery, including the efficiency of healthcare providers.⁶ The patents-in-suit are related to
7 technology for measuring and evaluating physician efficiency.⁷ “Efficiency” means comparing
8 the cost of care provided by an individual physician to the cost of care provided by a relevant peer
9 group.⁸

10 CCGroup claims that OptumInsight’s Impact Intelligence product infringes claims 1, 9,
11 10, 11, 22, and 29 of its ‘126 Patent.⁹ OptumInsight claims that CCGroup’s Cave Grouper
12 product infringes claim 1 of the Seare Patents.¹⁰ The Seare Patents have a priority date of June 23,
13 1994.¹¹

14 A. The Patent Claims

15 Relevant here are asserted claims 22 and 29 of the Cave ‘126 Patent,¹² which state as
16 follows:

17 22. A method implemented on a computer system of determining
18 physician efficiency, the method comprising:

19 obtaining medical claims data stored in a computer readable medium
20 on the computer system;

21 performing patient analysis using said obtained medical claims data
22 to form episodes of care utilizing the computer system;

23 ³ Id.

24 ⁴ Id. at 2-3.

25 ⁵ Id.

26 ⁶ Id.

27 ⁷ Id.

28 ⁸ See Dkt. No. 139 at 3:10-11.

⁹ Dkt. No. 140 at 2; CCGroup has withdrawn claims 1, 9, 10, and 11.

¹⁰ Id.

¹¹ ‘079 Patent at 1; ‘252 Patent at 1.

¹² Claims 22 and 29 are identical other than the preamble, which is not relevant for purposes of this motion.

1 performing output process based on performed patient analysis
2 utilizing the computer system, the output process comprising:
3 assigning episodes of care to physicians; and
4 applying a first maximum duration rule to identify episodes of care;
5 assigning at least one physician to a report group utilizing the
6 computer system;
7 determining eligible physicians and episode of care assignments
8 utilizing the computer system;
9 calculating condition-specific episode of care statistics utilizing the
10 computer system;
11 calculating weighted episode of care statistics across medical
12 conditions utilizing a predefined set of medical conditions for a
13 specific specialty type utilizing the computer system; and
14 determining efficiency scores for physicians from said calculated
15 condition-specific episode of care statistics and said weighted
16 episode of care statistics calculated across medical conditions
17 utilizing the computer system.¹³

18 Asserted claims 1 of the Seare Patents¹⁴:

19 A computer-implemented process for processing medical claims
20 comprising a computer performing the following:

21 (a) reading a medical claim data, input as at least one of a plurality
22 of data records, into a computer memory;

23 (b) validating each of the at least one of a plurality of data records
24 for at least one of a diagnosis code and a treatment code;

25 (c) reading at least one pre-defined relationship between the at least
26 one of a diagnosis code and a treatment code in the validated at least
27 one of a plurality of data records and pre-defined episode
28 treatment categories; and

29 (d) grouping the validated at least one of a plurality of data records
30 to an episode treatment category based upon the pre-defined
31 relationship, each episode treatment category having a dynamic
32 time window defining a time period which validated at least one of
33 plurality of data records may be grouped to an episode treatment
34 category.

35 (e) classifying the patient data records into at least one of a plurality
36 of episode treatment groups, each of the plurality of episode
37 treatment groups being defined by an episode treatment category.¹⁵

38 ¹³ U.S. Patent 7,739,126.

39 ¹⁴ Claims 1 of the Seare Patents are identical except for the addition of step (e).

40 ¹⁵ U.S. Patent 7,774,252.

B. Procedural History

This suit is an outgrowth of a lawsuit filed by OptumInsight against CCGroup in Minneapolis, Minnesota. OptumInsight dismissed the Minnesota lawsuit. CCGroup filed its Complaint in this Court seeking a declaratory judgment on the patent infringement allegations made against it by OptumInsight.¹⁶

In its Second Amended Complaint (“SAC”), CCGroup claims that OptumInsight infringes its Cave ‘126 Patent, and seeks a declaratory judgment that CCGroup does not infringe OptumInsight’s family of Seare Patents and that the Seare Patents are invalid.¹⁷

In its Answer to CCGroup’s SAC, OptumInsight claims that it does not infringe the ‘126 Patent and that the ‘126 Patent is invalid, and counterclaims that CCGroup directly infringes the Seare Patents.¹⁸

On August 9, 2012, the Court held a claim construction hearing.¹⁹ The Court construed “weighted episode of care statistics” to mean “cost or length of care statistics for a group of medical conditions calculated using the relative importance of each condition to the others of the group.”²⁰ The Court ruled that the ordinary meaning of “determining eligible physicians and episode of care assignments” applied.²¹ The Court construed “maximum duration rule” to mean a “rule based on a maximum time period(s) that is used to group claim data pertaining to a patient’s medical condition(s) into an episode(s) of care.”²²

CCGroup now moves for summary judgment of noninfringement of the Seare Patents, and invalidity of the Seare Patents.²³ OptumInsight moves for summary judgment of noninfringement of the Cave ‘126 Patent, invalidity of the Cave ‘126 Patent, and validity of the Seare Patents.²⁴ CCGroup has also moved to exclude the testimony of OptumInsight’s expert witness Dr. Mark

¹⁶ Dkt. No. 89 at 5-7.

¹⁷ See Dkt. No. 89.

¹⁸ See Dkt. No. 96.

¹⁹ see Dkt. No. 92.

20 *Id.* at 6.

²¹ Id. at 9.

²² Id. at 9.

²³ Id. at 11.

²⁴ Dkt. No. 139.

1 Rattray (“Rattray”), Dr. J. William Thomas (“Thomas”), and Catharine Lawton (“Lawton”).²⁵
 2 OptumInsight has moved to exclude testimony of CCGroup’s damages expert witness Michael
 3 Lewis concerning CCGroup’s alleged damages.²⁶

4 II. LEGAL STANDARD

5 A motion for summary judgment should be granted if “there is no genuine dispute to any
 6 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. R. 56(c);
 7 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the
 8 initial burden of informing the court of the basis for the motion and identifying the portions of the
 9 pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the
 10 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

11 If the moving party meets this initial burden, the burden then shifts to the non-moving
 12 party to go beyond the pleadings and designate specific materials in the record to show that there
 13 is a genuinely disputed fact. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. The court must draw
 14 all reasonable inferences in favor of the party against whom summary judgment is sought.

15 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the mere
 16 suggestion that facts are in controversy, as well as conclusory or speculative testimony in
 17 affidavits and moving papers, is not sufficient to defeat summary judgment. See Thornhill Publ’g
 18 Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the non-moving party must come
 19 forward with admissible evidence to satisfy the burden. Fed. R. Civ. P. 56(c); see also Hal Roach
 20 Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

21 A genuine issue for trial exists if the non-moving party presents evidence from which a
 22 reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the
 23 material issue in his or her favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49
 24 (1986); see also Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991). Conversely,
 25 summary judgment must be granted where a party “fails to make a showing sufficient to establish

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 27 ²⁵ Dkt. No. 157.
 28 ²⁶ Dkt. No. 160.

1 the existence of an element essential to that party's case, on which that party will bear the burden
2 of proof at trial." Celotex, 477 U.S. at 322.

3 **III. DISCUSSION**

4 CCGroup asserts that OptumInsight infringes method claim 22 and apparatus claim 29 of
5 the Cave '126 Patent.²⁷ OptumInsight asserts that CCGroup infringes claim 1 of both Seare
6 Patents.²⁸ The parties both deny infringement and contend that the asserted claims of the patents
7 of the other side are invalid.²⁹ Thus, the primary factual issues in dispute are: 1. whether the
8 claims of the asserted patents are invalid; and 2. whether the asserted patents are infringed.

9 **A. Invalidity**

10 The Court begins by addressing the parties' invalidity arguments. OptumInsight contends
11 that the asserted claims of the '126 Patent are invalid because they do not meet the requirements
12 set forth in 35 U.S.C. §§ 102(a), 102(b), 102(g), or 112.³⁰ OptumInsight contends that Seare
13 Patents are valid over the asserted prior art.³¹ CCGroup contends that the asserted claims of the
14 Seare Patents are invalid because they do not meet the requirements set forth in 35 U.S.C. §§
15 102(b) or 112.³²

16 **i. The Cave '126 Patent**

17 OptumInsight argues that the asserted claims are invalid as anticipated under 35 U.S.C. §§
18 102(b) and 102(g) because Impact Intelligence works the same as its predecessor product, Impact
19 Analysis, therefore, Impact Analysis satisfies every element of the asserted claims and qualifies as
20 prior art because it was:

21 (a) sold or offered for sale more than a year before the March 2, 2004 filing date of the
22 '126 Patent;

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25 ²⁷ See Dkt. No. 147-4 at 1-2.

26 ²⁸ See Dkt. No. 139 at 1-4.

27 ²⁹ See *id.*; see also Dkt. No. 147-4 at 1-2.

³⁰ See Dkt. No. 96.

³¹ See Dkt. No. 139 at 34-38.

³² See Dkt. No. 144-4.

(b) publicly used by others in the United States more than a year before the March 2, 2004 filing date of the '126 Patent; and

(c) made in the United States before the invention date (March 2, 2004) of the ‘126 Patent claims and was not abandoned, suppressed, or concealed.³³

OptumInsight also argues that the asserted claims of the ‘126 Patent are invalid as anticipated under 35 U.S.C. § 102 because the Cave webpage article (the “Cave Advertisement”) satisfies every element of the asserted claims and qualifies as prior art because it was posted on the Internet more than a year before the March 2, 2004 filing date of the ‘126 Patent.³⁴

Finally, OptumInsight argues that the asserted claims of the ‘126 Patent are invalid under 35 U.S.C. § 112, first paragraph, because there is no description of “Applying a … maximum duration rule to identify episodes of care.”³⁵

a. Whether Impact Analysis was “on sale” and was ready for patenting before March 2, 2003 pursuant to 35 U.S.C. § 102(b)?

OptumInsight believes it is entitled to summary judgment on the grounds that a June 4, 2002 contract with Presbyterian Healthcare Services (“PHS”) provided that “IHCIS will deliver the Impact Analysis applications and associated supporting databases via mutually agreed upon formats and transmission media” invalidates the asserted claims under the § 102(b) on sale bar.³⁶ The Court disagrees.

Section 102(b) of the Patent Act bars the patentability of inventions that were on sale in this country more than one year prior to the date of the application for the patent.³⁷ The on-sale bar rule generally applies when two conditions are satisfied: 1. the product embodying the asserted

³³ See Dkt. No. 168 at 5-12.

³⁴ See Dkt. No. 168 at 22.

³⁵ See Dkt.No. 139 at 29.

³⁶ See Dkt. No. 168 at 6-7; see also SB Ex. 7 at ING00081396 ¶ 10.

³⁷ See 35 U.S.C. § 102(b) (“A person shall be entitled to a patent unless the invention was ... on sale in this country, more than one year prior to the date of the application for patent in the United States.”); see also *Cargill, Inc. v. Canbra Foods, Ltd.*, 476 F.3d 1359, 1368 (Fed. Cir. 2007) (holding that any attempt to commercialize the patented invention more than one year prior to filing the patent application creates an “on-sale bar” that invalidates a subsequently-issued patent).

1 claims must be the subject of a commercial offer for sale, and 2. the invention must be ready for
2 patenting.³⁸

3 As an initial matter, the ‘126 Patent claims priority to a provisional patent application filed
4 on March 2, 2004.³⁹ For purposes of § 102(b), the “critical date” is March 2, 2003.⁴⁰ Here,
5 OptumInsight proffers evidence of a June 4, 2002, contract with PHS that “IHCIS will deliver the
6 Impact Analysis applications ...”⁴¹ As such, the evidence establishes that OptumInsight’s contract
7 with PHS is more than a year before March 2, 2004.

8 Next, the question whether an invention is the subject of a commercial offer is a matter of
9 Federal Circuit law, analyzed under the law of contracts as generally understood.⁴² To prove that
10 an invention was the subject of a commercial sale, a defendant must demonstrate by clear and
11 convincing evidence that there was a definite sale or offer to sell more than one year prior to the
12 application for the patent, and that the subject matter of the offer to sell fully anticipated the
13 claimed invention or would have rendered the claimed invention obvious by its addition to the
14 prior art.⁴³

15 Here, OptumInsight cites to the contract with PHS to sell the outputs of the Impact
16 Analysis process [REDACTED].⁴⁴ OptumInsight demonstrates that there
17 was an offer to sell because the contract required that PHS pay IHCIS a substantial Impact
18 Analysis License Fee on an annual basis, which included 20 licensed users of Impact Analysis.⁴⁵
19 However, the contract with PHS to sell the outputs of the Impact Analysis is a process, which is a
20 series of acts or steps, and is not sold in the same sense as is a claimed product, device, or

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³⁸ See Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 67 (1998).

³⁹ Dkt. No. 168 at 1.

⁴⁰ Id.

⁴¹ See Dkt. No. 168 at 6-7.

⁴² Group One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041, 1047 (Fed. Cir. 2001) (“As a general proposition, we will look to the Uniform Commercial Code (‘UCC’) to define whether ... a communication or series of communications rises to the level of a commercial offer for sale.”).

⁴³ STX, LLC v. Brine, Inc., 211 F.3d 588, 590 (Fed. Cir. 2000).

⁴⁴ See Dkt. No. 168 at 6-7; see also SB Ex. 7 at ING00081396 ¶ 10.

⁴⁵ SB Ex. 7 at ING00081396 ¶ 11; see also In re Caveney, 761 F.2d 671, 676 (Fed. Cir. 1985) (A sale is a contract between parties wherein the seller agrees “to give and to pass rights of property” in return for the buyer’s payment or promise “to pay the seller for the things bought or sold.”).

1 apparatus, which is a tangible item.⁴⁶ “Know-how describing what the process consists of and
2 how the process should be carried out may be sold in the sense that the buyer acquires knowledge
3 of the process and obtains the freedom to carry it out pursuant to the terms of the transaction.”⁴⁷
4 Such a transaction is not a “sale” of the invention within the meaning of §102(b) because the
5 process has not been carried out or performed as a result of the transaction.⁴⁸ Here, sale of the
6 outputs of the Impact Analysis made by the claimed process by the licensee (IHCIS) would
7 constitute a sale of the process within the meaning of 35 U.S.C. 102(b).⁴⁹

8 CCGroup argues that the Impact Analysis methodology and documents were [REDACTED]
9 [REDACTED], and, for that reason, cannot be used as prior art to invalidate a
10 patent.⁵⁰ CCGroup points to Dr. Dunn’s admission that [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 Dunn Feb. 2014 Depo. at 40:7-17.

16 OptumInsight does not entirely dispute that the Impact Analysis and technical documents
17 describing that software [REDACTED] Instead, OptumInsight argues that a commercial sale
18 of the claimed invention is a bar, even if the sale is [REDACTED]⁵¹ Therefore, the
19 question presented is as follows: does a commercial sale by a third party of the claimed invention
20 constitute an on-sale bar if the contracts include [REDACTED]

21 The Federal Circuit has emphasized that “the overriding concern of the on-sale bar is an
22 inventor’s attempt to commercialize his invention beyond the statutory term.”⁵² Under the pre-
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25 ⁴⁶ In re Kollar, 286 F.3d 1326, 1332 (Fed. Cir. 2002).

26 ⁴⁷ See id.

27 ⁴⁸ See id.

28 ⁴⁹ See id. at 1333.

⁵⁰ See Dkt. No. 189-4 at 5.

⁵¹ See Dkt. No 169 at 9-11.

⁵² STX, LLC, 211 F.3d 590

1 AIA⁵³ version of § 102(b), sales or offers for sale, kept secret from the public, may trigger the on-
 2 sale bar.⁵⁴ Although these secret activities likely do not disclose claimed inventions to the general
 3 public, the statutory language of §102(b) is nevertheless broad enough to cover these actions.
 4 Additionally, even when a claimed invention itself is not the object of a sale or offer to sell, courts
 5 have applied a similar bar to patentability under a forfeiture rationale when a sale or offer for sale
 6 amounts to an indirect “secret commercialization” of a claimed invention. This gap-filling theory
 7 is illustrated by the disparate treatment applied to secret commercialization of unpatented methods
 8 depending on the identity of the commercializing party. When an inventor uses a secret,
 9 unpatented method to produce and sell goods that do not reveal the method, and does so for longer
 10 than the one-year grace period, these sales may bar the inventor from later patenting the method.⁵⁵
 11 OptumInsight misstates patent law by suggesting that evidence of a secret commercial sale by a
 12 third party can invalidate the ‘126 Patent. However, when a third party uses a secret, unpatented
 13 method to produce and sell such goods, this activity will not create a bar preventing a different
 14 inventor from later patenting the same method.⁵⁶ Thus, under pre-AIA § 102(b) and the related
 15 forfeiture doctrine, an inventor faces a simple choice: “he must content himself with either
 16 secrecy, or legal monopoly.”⁵⁷

17 Early public disclosure is a linchpin of the patent system. As between a prior inventor who
 18 benefits from a process by selling its product but suppresses, conceals, or otherwise keeps the
 19 process from the public, and a later inventor who promptly files a patent application from which
 20 the public will gain a disclosure of the process, the law favors the latter.⁵⁸

21 Accordingly, a reasonable jury might find that OptumInsight has not met its burden of
 22 proving by clear and convincing evidence that the commercial sale by IHCIS of the claimed

23 ⁵³ The Leahy–Smith America Invents Act (AIA) is a United States federal statute that was passed by Congress on
 24 September 16, 2011.

25 ⁵⁴ In re Caveney, 761 F.2d 675-76

26 ⁵⁵ See D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1147-48 (Fed. Cir. 1983).

27 ⁵⁶ See W.L. Gore & Associates v. Garlock, Inc., 721 F.2d 1540, 1549-50 (Fed. Cir. 1983).

28 ⁵⁷ Metallizing Eng’g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516,518 (2nd Cir. 1946).

29 ⁵⁸ W.L. Gore & Assoc.s, Inc., 721 F.2d 1540; RCA Corp. v. Data Gen. Corp., 887 F.2d 1056, 1062 (Fed. Cir. 1989)
 30 (“one policy underlying the [on-sale] bar is to obtain widespread disclosure of new inventions to the public via patents
 31 as soon as possible.”).

1 invention constituted an on-sale bar because [REDACTED]

2 [REDACTED] Therefore, the Court DENIES OptumInsight's summary judgment as to invalidity
3 under the § 102(b) on-sale bar based on the Federal Circuit's holding that where an invention is
4 kept secret, and remains secret after a sale of the product, that sale will not bar another inventor
5 from the grant of a patent on that method.⁵⁹

6 b. Whether Impact Analysis was in public use before March 2, 2003 pursuant to
7 U.S.C. § 102(b)?

8 OptumInsight moves for summary judgment on the grounds that IHCIS commercially
9 exploited Impact Analysis and that the Impact Analysis methodology was accessible to the public
10 before March 2, 2003.⁶⁰ Having reviewed the evidence, the Court disagrees.

11 The public use bar under 35 U.S.C. § 102(b) arises where the invention is in public use
12 before the critical date and is ready for patenting.⁶¹ As explained by the Federal Circuit,

13 The proper test for the public use prong of the § 102(b) statutory bar
14 is whether the purported use: (1) was accessible to the public; or (2)
15 was commercially exploited. Commercial exploitation is a clear
16 indication of public use, but it likely requires more than, for
17 example, a secret offer for sale. Thus, the test for the public use
18 prong includes the consideration of evidence relevant to
experimentation, as well as, *inter alia*, the nature of the activity that
occurred in public; public access to the use; confidentiality
obligations imposed on members of the public who observed the
use; and commercial exploitation

19 Id. at 1380.

20 CCGroup argues that Impact Analysis methodologies and technical documents describing
21 the software were maintained in confidence and not publicly available.⁶² As such, the
22 confidentiality restrictions imposed by ICHIS preclude a finding that Impact Analysis is prior
23 art.⁶³ OptumInsight does not contest that some confidentiality agreements existed. Rather,
24 OptumInsight argues that while some details were confidential, the underlying methodology used

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26 ⁵⁹ See D.L. Auld Co., 714 F.2d 1144

27 ⁶⁰ See Dkt. No. 168 at 8-11.

⁶¹ Invitrogen Corp. v. Biocrest Manufacturing L.P., 424 F.3d 1374 (Fed. Cir. 2005).

⁶² See Dkt. 189-4 at 6-12.

⁶³ See Dkt. No. 147-4 at 16-18.

1 in Impact Analysis was disclosed, at least at a high level to the general public and to certain third
2 parties.⁶⁴

3 Public use by a third party within the meaning of § 102(b) generally includes “any use of
4 the claimed invention by a person other than the inventor who is under no limitation, restriction or
5 obligation of secrecy to the inventor.”⁶⁵ To determine whether the use of the invention was indeed
6 “public” within the meaning of § 102(b), courts assess the “totality of circumstances.”⁶⁶

7 A flexible list of factors that courts can consider includes: the nature of the activity that
8 occurred in public; the public access to and knowledge of the public use; whether person other
9 than the inventor performed the testing; the number of tests; the length of the test period in relation
10 to tests of similar devices; and whether the inventor received payment for the testing.⁶⁷ While all
11 of these factors are considered, relinquishment of control by the patentee and the presence of
12 absence of a secrecy agreement appear to carry the most weight.⁶⁸

13 OptumInsight’s corporate witness, Dr. Dunn, admitted that IHCIS treated the Impact
14 Analysis methodology as [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 Dunn Feb. 2014 Depo. at 40:7-13.

20 OptumInsight, however, argues that IHCIS was openly engaging in the commercial
21 exploitation of the methodology embodied in Impact Analysis before March 2, 2003.⁶⁹
22 OptumInsight alleges that the numerous sales, marketing material on the IHCIS website and press
23 releases announcing these sales fully establish commercial exploitation.⁷⁰ Specifically,

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25 ⁶⁴ See Dkt. No. 169 at 9-11.
26 ⁶⁵ Netscape Communications Corp. v. Knorad, 295 F.3d 1315, 1320 (Fed. Cir. 2002).

⁶⁶ Netscape, 295 F.3d 1320

⁶⁷ Id.

⁶⁸ See Allied Colloids Inc. v. American Cyanamid Co., 64 F.3d 1570, 1574 (Fed. Cir. 1995).

⁶⁹ See Dkt. No. 168 at 8.

⁷⁰ See id.

1 OptumInsight cites that: (1) the contract with PHS included a “Fees and Payment Schedule” that
2 included a substantial “Impact Analysis License Fee” as well as other licensing fees;⁷¹ (2) a
3 September 25, 2002 press release publicly announced that Presbyterian Health Plan (PHP), New
4 Mexico’s largest managed care organization, will deploy IHCIS’ Impact Analysis;⁷² and (3) that
5 IHCIS maintained a publicly available website targeting customers and potential customers of
6 Impact Analysis and describing IHCIS products, including Impact Analysis.⁷³ OptumInsight
7 contends that this record of commercial sales and promotional activity by IHCIS illustrates
8 commercial exploitation.⁷⁴ This is not a persuasive argument, though, because the Federal Circuit
9 has held that mere knowledge of the invention by the public does not warrant rejection under §
10 102(b).⁷⁵ Section 102(b) bars public use or sale, not public knowledge.⁷⁶ Moreover, in the case of
11 third-party uses, as in this case, “being accessible to the public still requires public availability;
12 secret or confidential third-party uses do not invalidate later filed patents.”⁷⁷

13 Accordingly, in light of the clear and convincing evidence standard for proving invalidity,
14 the court concludes a reasonable jury could find that OptumInsight has not met its burden of
15 showing that the Impact Analysis was accessible to public before March 2, 2003. Therefore, the
16 Court DENIES OptumInsight's summary judgment of invalidity under the public use prong of §
17 102(b) based on the confidentiality agreements.

OptumInsight asserts that the claims of the ‘126 Patent, if read to cover Impact Analysis, are invalid under 35 U.S.C. § 102(g)(2).⁷⁸ The Court disagrees.

24 || 71 SB Ex. 7 at ING00081396 ¶ 11

72 SB Ex. 8

25 73 SB Ex. 3

⁷⁴ See Dkt. No. 168 at 9.

⁷⁵ *TPLabs., Inc. v. Professional Positioners, Inc.*, 724 F.2d 965, 970 (Fed. Cir. 1984).

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⁷⁷ *Dev. L.P. v. Sunovion Pharm.s. Inc.*, 715 F.3d 1351 (Fed. Cir. 2013); see also Dunn Feb. 2014 Depo. at 40:7-13.

⁷⁸ See Dkt. No. 168 at 11.

1 Section 102(g)(2) provides that a patent is invalid if “before such person’s invention
2 thereof, the invention was made in this country by another inventor who had not abandoned,
3 suppressed or concealed it.”⁷⁹

4 Here, OptumInsight argues that Impact Analysis was in public use before March 2, 2003,
5 and that Impact Analysis was invented before March 2, 2004.⁸⁰ CCGroup argues that Impact
6 Analysis is not invalidating art because the methodologies and technical documents describing
7 that software were maintained in confidence and not publicly available.⁸¹

8 Under 35 U.S.C. § 102(g) “the courts have consistently held that an invention, though
9 completed, is deemed abandoned, suppressed, or concealed if, within a reasonable time after
10 completion, no steps are taken to make the invention publicly known. Thus failure to file a patent
11 application; to describe the invention in a publicly disseminated document; or to use the invention
12 publicly, have been held to constitute abandonment, suppression, or concealment.”⁸² In Correge,
13 an invention was actually reduced to practice, seven months later there was a public disclosure of
14 the invention, and eight months thereafter a patent application was filed. The court held that filing
15 a patent application within one year of a public disclosure is not an unreasonable delay, therefore
16 reasonable diligence must only be shown between the date of the actual reduction to practice and
17 the public disclosure to avoid the inference of abandonment.⁸³ Unlike Correge, OptumInsight’s
18 Impact Analysis methodologies and technical documents were maintained in confidence and not
19 publicly available before March 2, 2003.⁸⁴

20 For the same reason relating to lack of public disclosure, OptumInsight’s § 102(g)
21 argument fails. Private or confidential sales, those that do not confer knowledge of the invention
22 to the public, do not constitute invalidating art under § 102(g).⁸⁵ Accordingly, a reasonable jury
23 might find that OptumInsight has not met its burden of proving by clear and convincing evidence

24 ⁷⁹ See 35 U.S.C. § 102(g)(2).

25 ⁸⁰ See Dkt. No. 169 at 5-6.

26 ⁸¹ See Dkt. No. 189-4 at 6-12.

27 ⁸² Correge v. Murphy, 705 F.2d 1326, 1330 (Fed. Cir. 1983).

28 ⁸³ See id.

29 ⁸⁴ See Dkt. 189-4 at 6-12; see also Dunn Feb. 2014 Depo. at 40:7-13.

30 ⁸⁵ See Apotex USA v. Merck & Co., 254 F.3d 1031, 1038-39 (Fed. Cir. 2010).

1 that the Impact Analysis methodologies and the technical documents describing that software were
2 not maintained in confidence and publicly available. Therefore, the Court DENIES
3 OptumInsight's summary judgment as to invalidity under § 102(g).

4 d. Does the Cave Advertisement anticipate the asserted claims?

5 OptumInsight moves for summary judgment on the grounds that the Cave Advertisement
6 anticipates Claims 22 and 29 of the '126 Patent.⁸⁶ Having reviewed the evidence, the Court
7 disagrees.

8 A patent claim is invalid as anticipated under 35 U.S.C. § 102 if a single prior art reference
9 contains, either explicitly or implicitly, all of the elements of the claim.⁸⁷ Whether or not a single
10 reference contains all of the elements of a claim is a question of fact.⁸⁸

11 Although anticipation is a question of fact, where there are no “genuine factual disputes
12 underlying the anticipation inquiry, the issue is ripe for judgment as a matter of law.”⁸⁹ Evidence
13 of anticipation, like all questions of invalidity, “must be clear as well as convincing.”⁹⁰ The
14 Federal Circuit has held that “the identical invention must be shown in as complete detail as is
15 contained in the … claim.”⁹¹ The elements must be arranged as required by the claim, but this is
16 not an *ipsissimis verbis* test, i.e., identity of terminology is not required.⁹²

CCGroup makes a series of argument in response. First, CCGroup argues that there is no evidence that the Cave Advertisement was publicly available.⁹³ As such, without this evidence, CCGroup argues that OptumInsight cannot meet its burden of proof on invalidity.⁹⁴ The U.S. Patent and Trademark Office (“PTO”) has held that a website captured by Internet Archive

⁸⁶ See Thomas Invalidity Report at Exhibit 18.

⁸⁷ See Oakley, Inc. v. Sunglass Hut International, 316 F.3d 1331, 1339 (Fed. Cir. 2003) (A determination that a claim is invalid as being anticipated or lacking novelty under 35 U.S.C. § 102 requires a finding that “each and every limitation is found either expressly or inherently in a single prior art reference”).

⁸⁸ Sebeckon Marine, Inc. v. NFM, Inc., 292 F.3d 718, 725 (Fed. Cir. 2002) (Anticipation under 35 U.S.C. § 102 means lack of novelty, and is a question of fact).

⁸⁹ SmithKline Beecham Corp. v. Apotex Corp., 403 F.3d 1331, 1343 (Fed. Cir. 2005).

⁹⁰ *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1315 (Fed. Cir. 2005).

⁹¹ Richardson v. Suzuki Motor Co., 868 F.2d

⁹² In re Bond, 910 F.2d 831 (Fed. Cir. 1990).

⁹³ See Dkt. No. 147-4 at 25-26.

94 Id.

1 Wayback Machine (“Internet Archive”)⁹⁵ was considered as prior art.⁹⁶ The PTO will accept date
 2 stamps from the Internet Archive as evidence of when a given Web page was accessible to the
 3 public.⁹⁷ These dates are used to determine if a Web page is available as prior art.⁹⁸ Here,
 4 OptumInsight provides evidence that the Internet Archive archived the Cave Advertisement as of
 5 February 17, 2003.⁹⁹ This date proves that there was no barrier to members of the general public
 6 accessing the Cave Advertisement at that time.¹⁰⁰

7 Second, CCGroup argues that the Cave Advertisement does not teach all the essential
 8 claim limitations required by the asserted Claims 22 and 29 of the ‘126 Patent.¹⁰¹ Specifically,
 9 CCGroup asserts that OptumInsight relies on a single sentence from the Cave Advertisement to
 10 satisfy three limitations of the asserted claims.¹⁰² That sentence reads: “[a] methodology
 11 developed by the Cave Consulting Group examines condition-specific, longitudinal episodes of
 12 care.”¹⁰³ According to OptumInsight, this sentence satisfies the limitations of the following three
 13 limitations of CCGroup’s asserted claims 22 and 29:

14 Obtaining medical claims data stored in a computer readable
 15 medium on the computer system;

16 Performing patient analysis using said obtained medical claims data
 17 to form episodes of care utilizing the computer system;

18 Applying a first maximum duration rule to identify episodes of care

19 See Exhibit 18 to Thomas Invalidity report.

20 CCGroup contends that this sentence from the Cave Advertisement does not teach these three
 21 steps of the asserted claims because:

22 1. It has nothing to do with obtaining medical claims data stored in a
 23 computer readable medium, does not describe how episodes are

24 ⁹⁵ Internet Archive Wayback Machine is a digital archive of the World Wide Web and other information on the
 25 Internet. It enables users to see archived versions of webpages across time.

26 ⁹⁶ See Ex Parte Hicks, No. 2011-007925, 2013 WL 5882933, at *4 (P.T.A.B. Oct. 31, 2013).

27 ⁹⁷ See In re Wyer, 655 F.2d at 221, 210 USPQ at 790; see also MPEP 2128.

28 ⁹⁸ See Ex Parte Molander, No. 2008-2589, 2009 WL 726751, at *3, 5-6 (B.P.A.I. 2009).

29 ⁹⁹ See Dkt. No. 169 at 26-28.

30 ¹⁰⁰ Id.

31 ¹⁰¹ See Dkt. No. 147-4 at 26-29.

32 ¹⁰² Id.

33 ¹⁰³ See Exhibit 18 to Thomas Invalidity Report.

1 generated, whether they are provided to CCGroup or are generated
 2 by CCGroup, what information is used to generate the episodes, or
 3 what information is stored in the episodes (e.g. actual medical
 4 claims data vs. overall cost and duration of care information);

5 2. the ... reference to “episodes” relied on by Optum[Insight] could
 6 be created based on a methodology that generates episodes from
 7 data other than claims data (e.g., inpatient hospital records) or
 8 through a methodology that does not involve patient analysis (e.g.,
 9 physician-centric episodes rather than patient-centric episodes);

10 3. With regard to the third limitation, Thomas properly admits that
 11 nothing in the Cave Advertisement explicitly teaches the step of
 12 applying a maximum duration rule. ... (“The paper does not disclose
 13 ‘using a first maximum duration rule to identify episodes of care.’”).
 14 Instead, Thomas argues that if Impact Intelligence - the product
 15 CCGroup accuses of infringement - is found to infringe, the Cave
 16 Advertisement’s reference to “longitudinal episodes of care” will
 17 similarly anticipate the asserted claims. ... Thomas’s reasoning,
 18 which is confusing at best, suggests that those skilled in the art
 19 would simply realize that the reference to “longitudinal episodes of
 20 care” necessarily requires application of a maximum duration rule -
 21 that is “a rule based on a maximum time period that is used to group
 22 claim data pertaining to a patient’s medical conditions into an
 23 episode of care.”

24 Dkt. No. 147-4 at 27-28.

25 OptumInsight argues that the Cave Advertisement inherently discloses obtaining medical
 26 claims data stored in a computer readable medium on the computer system.¹⁰⁴ Specifically,
 27 OptumInsight argues that “it was well known in the art that forming episodes of care and
 28 performing physician efficiency measurement was a data intensive process and that claims
 1 groupers necessarily operated on electronically stored medical claims records.”¹⁰⁵ OptumInsight
 2 also argues that “one of ordinary skill in the art would have understood that, in order to ‘examine
 3 condition-specific, longitudinal episodes of care’ as disclosed in the ‘Cave Advertisement,’ the
 4 disclosed methodology must first form those episodes of care.”¹⁰⁶

5 However, “[a]nticipation is typically established by one skilled in the art who must identify
 6 each claim element, state the witness[’] interpretation of the claim element, and explain in detail
 7 how each claim element is disclosed in the prior art reference.”¹⁰⁷ OptumInsight fails to explain in

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¹⁰⁴ See Dkt. No. 169 at 22-23.

¹⁰⁵ Id.

¹⁰⁶ Id. at 23.

¹⁰⁷ Lucent Technologies, Inc. v. Microsoft Corp., 544 F. Supp. 2d 1080, 1091 (S.D. Cal. 2008).

1 detail how each claim element is disclosed in the single sentence of the Cave Advertisement.
 2 Moreover, the testimony is insufficient if it is merely conclusory.¹⁰⁸ It must be clear. For
 3 example, OptumInsight's argument that "if this step is read so broadly as to reach Impact
 4 Intelligence, applying the same claim scope, one of the ordinary skill in the art would have
 5 understood that the methodology disclosed in the 'Cave Advertisement' necessarily discloses this
 6 step" is merely conclusory.¹⁰⁹ It is not "the task of the district court, to attempt to interpret
 7 confusing or general testimony to determine whether a case of invalidity has been made out,
 8 particularly at the summary judgment stage."¹¹⁰

9 Because the uncontested evidence demonstrates that the Cave Advertisement does not
 10 anticipate each and every element as set forth in the asserted claims, either expressly or inherently,
 11 summary judgment as to invalidity is improper. Therefore, the Court DENIES OptumInsight's
 12 summary judgment as to invalidity under 35 U.S.C. § 102 of the asserted claims by the Cave
 13 Advertisement.

14 e. Whether the claim limitations found in the asserted claims of the '126 Patent
 15 are invalid under 35 U.S.C. § 112?

16 OptumInsight argues that Claims 22 and 29 are invalid for lack of written description and
 17 enablement under 35 U.S.C. § 112(a) because the '126 Patent specification fails to describe
 18 applying a maximum duration rule to identify episodes of care and is devoid of an enabling
 19 disclosure of how to apply a maximum duration rule to identify episodes of care.¹¹¹ Having
 20 reviewed the evidence, the Court disagrees.

21 The first paragraph of 35 U.S.C. § 112 require that the specification include the following:

22 (A) A written description of the invention;
 23 (B) The manner and process of making and using the invention (the enablement
 24 requirement); and

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 26 ¹⁰⁸ Schumer, 308 F.3d at 1315-16.

27 ¹⁰⁹ See Dkt. No. 169 at 25.

28 ¹¹⁰ Id. at 1316.

¹¹¹ See Dkt. No. 139 at 32-34; see also Dkt. No. 188 at 19-20.

1 (C) The best mode contemplated by the inventor of carrying out his invention.¹¹²

2 To satisfy the written description requirement, the specification must describe the claimed
 3 invention in sufficient detail that one skilled in the art can reasonably conclude that the inventor
 4 had possession of the claimed invention.¹¹³ Specifically, the specification must describe the
 5 claimed invention in a manner understandable to a person of ordinary skill in the art and show that
 6 the inventor actually invented the claimed invention.¹¹⁴ The enablement requirement refers to the
 7 requirement that the specification describe how to make and how to use the invention.¹¹⁵ The
 8 invention that one skilled in the art must be enabled to make and use is that defined by the claim(s)
 9 of the particular application or patent.¹¹⁶ In contrast to the written description, the adequacy of
 10 enablement is a question of law, although like claim constructions, enablement findings may have
 11 factual underpinnings.¹¹⁷

12 OptumInsight argues that Claims 22 and 29 are invalid for lack of written description
 13 because the '126 Patent specification fails to describe applying a maximum duration rule to
 14 identify episodes of care.¹¹⁸ Specifically, OptumInsight argues that CCGroup improperly relies on
 15 references in the specification to the use of maximum duration rules to refine episodes of care,
 16 when the claim language requires using maximum duration rules to identify episodes of care.¹¹⁹
 17 Further, OptumInsight argues that the specification is devoid of an enabling disclosure of how to
 18 apply a maximum duration rule to identify episodes of care.¹²⁰ Lastly, OptumInsight argues that
 19 this issue can be decided at summary judgment, because claim construction is an issue of law for
 20 the court.¹²¹

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 23 ¹¹² 35 U.S.C. § 112(a).

24 ¹¹³ Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1562-63 (Fed. Cir. 1991).

25 ¹¹⁴ Id.

26 ¹¹⁵ CFMT, Inc. v. Yieldup Int'l Corp., 349 F.3d 1333, 1338 (Fed. Cir. 2003)

27 ¹¹⁶ Id.

28 ¹¹⁷ Martek Bioscience Corp. v. Nutrinova, Inc., 579 F.3d 1363, 1378 (Fed. Cir. 2009).

¹¹⁸ See Dkt. No. 139 at 32-33.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id.

1 Here, OptumInsight requests the Court to construe the phrase “to identify” as to the written
 2 description and enablement of the asserted claims under § 112(a). However, the Court has already
 3 construed claims and issued an order on that subject.¹²² Neither party requested construction of
 4 this phrase previously, and the Court will not construe it now.

5 CCGroup argues that the specification of the ‘126 Patent provides ample written
 6 description of the invention, including examples of how that invention is implemented.¹²³ For
 7 example, the specification teaches application of a dynamic time window that can be used as a
 8 maximum duration rule to identify episodes of care for subsequent analysis:

9 The specified time period, or window period, is based on the
 10 maximum number of days between contact with a provider for
 11 which follow-up care is still reasonable. Each of the medical
 12 conditions has its own unique window period. If the date of service
 13 for a patient’s episode is separated by a longer period than the
 14 window period, the latest date of service considered the start date for
 15 a new condition-specific episode of care.

16 See ‘126 Patent at 45:65-46:59.

17 CCGroup argues that the specification also discloses the use of a static time window (a second
 18 form of maximum duration rule) that controls the maximum duration for chronic episodes of care:

19 The fourth function of the PATAN output process is to implement
 20 the maximum duration rule for episodes of care, which is 180 days.
 21 For chronic conditions (e.g. diabetes, asthma, ischemic heart
 22 disease), an episode of care begins when a CLI is initially found
 23 during the study period that has a defined ICD.9 code that has been
 24 assigned to that medical condition. Then, chronic conditions may
 25 continue on indefinitely as recognized by the window period of 365
 26 days. However, for the purposes of physician efficiency analysis,
 27 chronic conditions are considered to have a 180-day duration.
 28 Therefore, a chronic condition ends 180 days after identifying the
 first CLI with a diagnosis (defined ICD.9 code) for the specific
 chronic condition.

29 See ‘126 Patent at 67:61-68:10.

30 These disclosures from the specification establish that there is written description support in the
 31 specification for the maximum duration rule limitation of the asserted claims.¹²⁴

32 ¹²² See Dkt. No. 92.
 33 ¹²³ See Dkt. No. 167-4 at 34.
 34 ¹²⁴ See Dkt. No. 167-4 at 34.

1 Further, CCGroup argues that disclosure in the specification establish that there is written
2 description support in the specification for the maximum duration rule limitation of the asserted
3 claims.¹²⁵ The citations above explain how one skilled in the art would employ both static and
4 dynamic time windows to gather claim data into discreet episodes of care, therefore identifying
5 episodes of care.¹²⁶

Finally, at a minimum, OptumInsight’s written description and enablement argument presents a factual dispute that should be resolved by the jury after hearing from the experts on the scope, content and disclosure of the ‘126 Patent.¹²⁷ Therefore, the Court DENIES OptumInsight’s summary judgment as to invalidity under § 112(a) because the evidence raises a genuine dispute of material fact as to whether the ‘126 Patent’s specification provides adequate written description and enablement for the asserted claims.

ii. Seare Patents

a. Whether the Seare Patents are anticipated by the Cave Article or by the Aetna Proposal?

15 OptumInsight moves for summary judgment on the grounds that the invention claimed in
16 the Seare patents are valid and not anticipated by the two prior art publications: 1. an article
17 describing a study conducted by Douglas Cave (“the Cave Article”); and 2. a June 12, 1994,
18 proposal to Aetna (“Aetna Proposal”).¹²⁸ CCGroup moves for summary judgment on the grounds
19 that the invention claimed in the Seare Patents is anticipated by the Cave Article.¹²⁹ For the
20 purposes of this motion, OptumInsight focuses on one element common to both Seare Patents:
21 element (d), directed to a “dynamic time window.”¹³⁰

24 | ¹²⁵ Id. at 35.

126 Id.

²⁵ ¹²⁷ See Scriptpro, LLC v. Innovation Assoc., Inc., 762 F.3d 1355, 1359 (Fed. Cir. 2014) (written description presents a question of fact for the jury); see also Callicrate v. Wadsworth Mfg., Inc., 427 F.3d 1361, 1373. (Fed. Cir. 2005) (enablement is a question of law based on underlying facts).

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¹²⁸ See Dkt. No. 139 at 34-38.

¹²⁹ See Dkt. No. 147-4 at 37-38.

130 sec.

First, OptumInsight argues that the Cave Article does not disclose dynamic time windows. The Court has construed the term “dynamic time window” to mean “a time period that can reset based upon receipt of related claim records within a predefined time period.”¹³¹ The Cave Article references “window period[s],” but it does not disclose time periods that reset. Specifically, OptumInsight argues that a person of ordinary skill in the art in 1994 would not have been aware of methodologies used to implement time windows that reset, and the language used in the Cave Article would have been understood to mean a fixed window period from the start of an episode because that is how groupers worked at that time.¹³² CCGroup responds that the Cave Article does teach the methodology that incorporates an algorithm for grouping raw medical claim data into episodes of care.¹³³ Based on the foregoing disclosure, it presents a factual dispute that the Cave Article teaches use of a dynamic time window to build episodes of care that must be resolved by the jury at trial.

Therefore, the Court DENIES OptumInsight's summary judgment as to validity of the Seare Patents because the evidence raises a genuine dispute of material fact as to whether the Cave Article teaches use of a dynamic time window to build episodes of care.

Second, OptumInsight argues that the Aetna Proposal is not prior art because the reference was not made publicly available.¹³⁴ However, CCGroup argues that the Aetna Proposal is anticipating prior art under 35 U.S.C. § 102(g), where it must only show that the system described in the Aetna Proposal was not “abandoned, suppressed or concealed.”¹³⁵

For the same reason relating to the earlier lack of public disclosure arguments under § 102(b) and § 102(g), CCGroup’s § 102(g) argument fails. Private or confidential sales, those that do not confer knowledge of the invention to the public, do not constitute invalidating art under § 102(g).¹³⁶ Accordingly, CCGroup has not raised a genuine issue of material fact as to the Aetna

¹³¹ Dkt. 92 at 22.

¹³² RR ¶ 25, 27, 29.

¹³³ See Dkt. No. 167-4 at 37-38.

¹³⁴ See B.R.A.

¹³⁵ See Dkt. No. 167-4 at 38

¹³⁶ See Apotex 254 F 3d 1038-39.

1 Proposal. Therefore, the Court GRANTS OptumInsight's summary judgment concerning the
2 validity of the Seare Patents relating to the Aetna Proposal.

3 Finally, CCGroup argues that the asserted claims of the Seare Patents are invalid because
4 they are anticipated by the Cave Article.¹³⁷ Specifically, CCGroup argues that the Cave Article
5 teaches reading in claims data, validating that data, and reading a pre-defined relationship between
6 the coding in that data and established medical conditions.¹³⁸ However, as explained earlier, the
7 Cave Article does not disclose a "dynamic time window."¹³⁹ Accordingly, given the clear and
8 convincing evidence standard, a reasonable jury could find that CCGroup has not met its burden
9 of showing that the Cave Article does not anticipate each and every element as set forth in the
10 asserted claims of the Seare Patents. Therefore, the Court DENIES CCGroup's summary
11 judgment as to invalidity of the asserted claims of the Seare Patents.

12 b. Whether the asserted claims of the Seare Patents are definite and enabled
13 under 35 U.S.C. § 112?

14 CCGroup asserts that element (d), the "grouping" step, is indefinite and lacks enablement
15 because they are "fatally vague and are also inoperable."¹⁴⁰ Specifically, the seemingly two
16 conflicting requirements in the claimed grouping step: (1) satisfying the predefined relationship
17 between the claimed data and the episode treatment category, and (2) satisfying the temporal
18 requirements of the "dynamic time window" for that episode treatment category.¹⁴¹ The Court
19 disagrees.

20 Patents are presumed to be valid, and the party challenging the validity of a patent bears
21 the burden of proving invalidity by clear and convincing evidence.¹⁴² The Court looks to the
22 intrinsic evidence because it is the primary source for determining the meaning of a claim.¹⁴³
23 Here, the patent examiner rejected claim of the '079 patent as allegedly failing to provide an

24 _____
25 ¹³⁷ See Dkt. No. 147-4 at 38.

26 ¹³⁸ Id. at 40.

27 ¹³⁹ See Dkt. No. 139 at 34-38.

28 ¹⁴⁰ See Dkt. No. 147-4 at 38.

¹⁴¹ See CCGroup Ex. 25 at ¶ 76.

¹⁴² 35 U.S.C. § 282

¹⁴³ Phillips v. AWH Corp., et al., 415 F.3d 1303, 1312-1324 (Fed. Cir. 2005).

1 enabling disclosure for this element.¹⁴⁴ In response, the applicant provided a detailed description
 2 of how this feature is enabled by the disclosure, including providing an analysis of the source code
 3 appendix.¹⁴⁵ The patent examiner withdrew the rejection.¹⁴⁶

4 Accordingly, in light of the clear and convincing evidence standard for proving invalidity,
 5 a reasonable jury could find that CCGroup has not met its burden of showing that the specification
 6 in the Seare Patents are not definite and enabling under 35 U.S.C. § 112. Therefore, the Court
 7 DENIES CCGroup's summary judgment of invalidity relating to the asserted claims of the Seare
 8 Patents under §112.

9 **B. Non-Infringement**

10 Both parties move for summary judgment on the infringement issue. OptumInsight moves
 11 for summary judgment of non-infringement on all of CCGroup's asserted claims in the '126
 12 Patent.¹⁴⁷ CCGroup moves for summary judgment of non-infringement on all asserted claims in
 13 the Seare Patents.¹⁴⁸ The Court DENIES both motions for summary judgment for the following
 14 reasons.

15 **i. The Cave '126 Patent**

16 OptumInsight moves for summary judgment on three non-infringement arguments with
 17 respect to asserted claims 22 and 29 of the '126 Patent.¹⁴⁹ Specifically, OptumInsight argues that
 18 Impact Intelligence uses a different method, and it does not infringe any of the asserted claims of
 19 the '126 Patent because Impact Intelligence does not: (1) use a "maximum duration rule to
 20 identify" episodes of care; (2) perform a step of "determining eligible physicians and episode of
 21 care assignments"; and (3) "calculat[e] weighted episode of care statistics across medical
 22 conditions utilizing a predefined set of medical conditions."¹⁵⁰ Having reviewed the evidence, the
 23 Court disagrees.

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 25 ¹⁴⁴ See Ex. 28 at ING00001552-56.
 26 ¹⁴⁵ See id. at ING00001559-68.
 27 ¹⁴⁶ See id. at ING00001731-33.
 28 ¹⁴⁷ Dkt. No. 139.
 29 ¹⁴⁸ Dkt. No. 169.
 30 ¹⁴⁹ Dkt. No. 139 at 11-12.
 31 ¹⁵⁰ Id.

1 A claim for patent infringement must be proven by a preponderance of evidence.¹⁵¹ Patent
 2 infringement is a two-step inquiry. First, the court must construe the asserted patent claim(s) as a
 3 matter of law.¹⁵² Second, the fact finder – here, the court for purposes of summary judgment –
 4 must determine whether the accused product, composition, system, or process contains each
 5 limitation of the properly construed claims, either literally or under the doctrine of equivalents.¹⁵³
 6 The first step is a question of law; the second step is a question of fact.¹⁵⁴

7 “Summary judgment on the issue of infringement [or noninfringement] is proper when no
 8 reasonable jury could find that every limitation recited in a properly construed claim either is or is
 9 not found in the accused device either literally or under the doctrine of equivalents.”¹⁵⁵ To be
 10 entitled to summary judgment of noninfringement, the moving party must demonstrate that the
 11 facts and inferences, when viewed in the light most favorable to the nonmoving party, would not
 12 persuade a reasonable jury to return a verdict in favor of the nonmoving party – the patent
 13 owner.¹⁵⁶

14 First, the Court has already heard and resolved these issues through the claim construction
 15 hearing.¹⁵⁷ For example, the Court construed “‘maximum duration rule’ shall mean ‘rule based on
 16 a maximum time period(s) that is used to group claim data pertaining to a patient’s medical
 17 condition(s) into an episode(s) of care.’”¹⁵⁸ The Court based its definition on its recognition that
 18 the ‘126 Patent’s specification and claims “make clear [that] the maximum duration rule is used to
 19 control the formation of episodes of care ...”¹⁵⁹ Now, OptumInsight requests the Court for
 20 construction of the new term “identify.”¹⁶⁰ However, a “trial judge need not repeat or restate

21
 22 ¹⁵¹ Advanced Cardiovascular Sys., v. Scimed Life Sys., Inc., 261 F.3d 1329, 1336 (Fed. Cir. 2001).

23 ¹⁵² Markman v. Westview Instruments, Inc., 517 U.S. 370, 372-74 (1996); Cybor Corp., v. FAS Techs., Inc., 138 F.3d
 1448, 1454 (Fed. Cir. 1998).

24 ¹⁵³ Id.

25 ¹⁵⁴ Markman, 517 U.S. at 372-74; Ferguson Beauregard v. Mega Sys., Inc., 350 F.3d 1327, 1338 (Fed. Cir. 2003).

26 ¹⁵⁵ PC Connector Solution LLC v SmarDisk Corp., 406 F.3d 1359, 1364 (Fed. Cir. 2005).

27 ¹⁵⁶ Bus. Objects, S.A. v. Microstrategy, Inc., 393 F.3d 1377, 1378 (Fed. Cir. 2005) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

28 ¹⁵⁷ Dkt. No. 92.

29 ¹⁵⁸ Dkt. No. 92 at 11.

30 ¹⁵⁹ Id.

31 ¹⁶⁰ Dkt. No. 139

1 every claim term in order to comply with the ruling that claim construction is for the court as it is
 2 not an obligatory exercise in redundancy.”¹⁶¹ OptumInsight’s argument for the new term
 3 “identify” is an attempt to re-litigate the scope of the “maximum duration rule” limitation. As
 4 such, “restating a previously settled argument does not create an ‘actual dispute regarding the
 5 proper scope of the claims’ within the meaning of the “maximum duration rule” limitation.¹⁶²
 6 Similarly, OptumInsight’s argument regarding “predefined set” term is an attempt to re-litigate the
 7 “calculating weighted episode of care statistics across medical conditions utilizing a predefined set
 8 of medical conditions.”¹⁶³ The Court has already construed ““Weighted Episode of Care
 9 Statistics’ shall mean ‘cost or length of care statistics for a group of medical conditions calculated
 10 using the relative importance of each condition to the others of the group.”¹⁶⁴ These are both
 11 arguments the Court heard and construed during claim construction.¹⁶⁵ Because the Court has
 12 already resolved these issues through the construction of the terms, the Court is not obligated to
 13 provide another claim construction to these new terms.¹⁶⁶

14 Finally, the Court has construed that the ordinary meaning of the term “determining
 15 eligible physicians and episode of care assignments” shall apply.¹⁶⁷ OptumInsight argue that
 16 Impact Intelligence does not have a step of “determining eligible physicians and episode of care
 17 assignments,” rather it simply assigns the physicians to report groups and episodes to physicians
 18 using a peer group definition, and does not perform an additional step of “determining” whether
 19 such previously made assignments are “eligible.”¹⁶⁸ Further, OptumInsight argues that the claims
 20 require that the “determining” step come after the “assigning” steps.¹⁶⁹ In response, CCGroup

21 ¹⁶¹ U.S. Surgical Corp. v. Ethicon, Inc., 103 F.3d 1554, 1568 (Fed. Cir. 1997); see also Finjan, Inc. v. Secure

22 Computing Corp., 626 F.3d 1197, 1207 (Fed. Cir. 1997) (“Defendants attempted to resurrect a claim construction that

23 the district court already rejected, without offering a new definition. Restating a previously settled argument does not

24 create an ‘actual dispute regarding the proper scope of the claims’ within the meaning of 02 Micro. In this situation,

the district court was not obligated to provide additional guidance to the jury.”).

25 ¹⁶² See Finjan, 626 F.3d 1207.

26 ¹⁶³ Dkt. No. 139

27 ¹⁶⁴ Dkt. No. 92 at 6.

¹⁶⁵ Id.

¹⁶⁶ See id.

¹⁶⁷ Dkt. No. 92 at 9.

¹⁶⁸ See Dkt. 139 at 18-19; see also Dkt. No. 188 at 5-12.

¹⁶⁹ Id.

1 argues that there is nothing in the asserted claims requiring that the determining step be performed
 2 in a specific order relative to the assigning steps of the asserted claims.¹⁷⁰ Moreover, CCGroup
 3 argues that a proper claim interpretation allows the determining step to be performed before, after,
 4 or contemporaneously with the assigning step.¹⁷¹

5 This is a dispute between parties as to how a skilled artisan would interpret the plain and
 6 ordinary meaning of the terms at issue. However, disputes over how one skilled in the art would
 7 understand the plain meaning of term raises a factual question that must be resolved by the jury.¹⁷²
 8 Therefore, “at trial parties may introduce evidence as to the plain and ordinary meaning of the
 9 terms not construed by the Court to one skilled in the art, so long as the evidence does not amount
 10 to arguing claim construction to the jury.”¹⁷³

11 All three of OptumInsight’s non-infringement arguments for Claims 22 and 29 turn on the
 12 factual question of how one skilled in the art would interpret the plain meaning of the claim terms.
 13 Because such questions must be resolved by the jury, it would be inappropriate for the Court to
 14 entertain OptumInsight’s request for summary judgment of non-infringement at this point.¹⁷⁴
 15 Accordingly, OptumInsight’s motion for summary judgment of non-infringement is DENIED in
 16 view of the factual dispute as to how a skilled artisan would interpret the plain and ordinary
 17 meaning of the terms at issue.

18 ii. The Seare Patents

19 CCGroup moves for summary judgment of non-infringement and argues that its Cave
 20 Grouper does not infringe the asserted claims of the Seare Patents.¹⁷⁵ The Court disagrees.

21
 22
 23¹⁷⁰ See Dkt. No. 164-4 at 12-17.
 24¹⁷¹ Id.
 25¹⁷² See Apple, Inc. v. Samsung Electronics Co., Ltd., 2014 WL 660857, at *3 (N.D. Cal. 2014) (“Where, as here,
 26 parties did not seek construction of the terms at issue, courts give those terms their ordinary and customary meaning to
 27 a person of ordinary skill in the art in question at the time of the invention.”).
 28¹⁷³ Id.
 29¹⁷⁴ See id. (“The parties did not seek construction of this limitation, accordingly, it must be given its ordinary and
 30 customary meaning to a person ordinary skill in the art in question at the time of the invention ... Because reasonable
 31 minds could differ both as to the meaning and presence of this final limitation, the court declines to grant either
 32 parties’ motion for summary judgment with respect to the [] patent.”).
 33¹⁷⁵ Dkt. No. 147-4.

1 While claim construction is a matter of law, infringement itself is a question of fact.¹⁷⁶
 2 Therefore, a plaintiff is only entitled to summary judgment on the question of infringement “if the
 3 facts and inferences, when viewed in the light most favorable to [non-moving party], would not
 4 persuade a reasonable jury to return a verdict in favor of ...the non-moving party.”¹⁷⁷ As such,
 5 OptumInsight can defeat the summary judgment motion by presenting evidence from which a
 6 reasonable jury could resolve the issue in its favor.¹⁷⁸

7 Claim 1 of the Seare Patents requires a step of “(c) reading at least one pre-defined
 8 relationship between the at least one of a diagnosis code and a treatment code in the validated at
 9 least one of a plurality of data records and pre-defined episode treatment categories.”¹⁷⁹ The
 10 Court has construed that “Episode Treatment Category” shall mean “a classification that includes
 11 one or more episode treatment groups” and that the plain meaning of the term “validate” shall
 12 apply.¹⁸⁰

13 CCGroup asserts that OptumInsight has failed to point to any evidence that the Cave
 14 Grouper performs the “reading” function of this step.¹⁸¹ OptumInsight’s expert, Dr. Rattray,
 15 points to a pre-programmed table in the Cave Grouper to satisfy this step (c) limitation.¹⁸²
 16 However, CCGroup argues that the pre-programmed table in the Cave Grouper does not satisfy
 17 the claim limitation because it “has nothing to do with reading a diagnosis or treatment code from
 18 a claim data record”¹⁸³ In response, OptumInsight argues that CCGroup’s argument is
 19 premised on an improper reading of the claim language.¹⁸⁴ In step (c), “the claim requires reading
 20 a relationship between [A] and [B], where A is the diagnosis code or the treatment code in the

21
 22 ¹⁷⁶ See Frank's Casing Crew and Rental Tools, Inc. v. Weatherford International, Inc., 389 F.3d 1370,1376 (Fed. Cir. 2004)

23 ¹⁷⁷ Business Objects, S.A. v. Microstrategy, Inc., 398 F.3d 1366, 1371 (Fed. Cir. 2004); see also Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc., 289 F.3d 801, 812 (Fed. Cir. 2002).

24 ¹⁷⁸ Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986) (“[t]he party opposing the motion is required merely to point to an evidentiary conflict created on the record”).

25 ¹⁷⁹ See '079 Patent at 38:51-54; '252 Patent at 30:45-48.

26 ¹⁸⁰ See Dkt. No. 92.

27 ¹⁸¹ See Dkt. No. 147-4 at 31-32.

¹⁸² See Rattray Report at ¶¶ 73-74; see also Rattray Dep. Tr., 121:12-129:11.

¹⁸³ See Dkt. No. 189-4 at 21-22.

¹⁸⁴ See Dkt. No. 168 at 31-32.

1 validated data record and B is the pre-defined episode treatment categories. The reference to ‘in
2 the validated at least one of a plurality of data records’ modifies the source of the diagnosis and
3 treatment codes and is clearly not specifying where the pre-modified relationship or the pre-
4 defined episode treatment categories are being read from.”¹⁸⁵

5 The Court looks to the intrinsic evidence because it is the primary source for determining
6 the meaning of a claim.¹⁸⁶ The specification supports this plain reading of the claims language.
7 For example, the patent discloses “that CPT treatment codes and ICD-9 diagnosis codes are read
8 from the medical claims data. The index code described in the ‘079 patent however, which is one
9 example of the ‘predefined relationship,’ is read from a look up table in the software.”¹⁸⁷ As such,
10 OptumInsight argues that “the predefined relationship between an index code and an ICD-9 code
11 is certainly ‘read’ – but it is read from a database that is part of the Cave Grouper medical
12 ‘knowledgebase’ and not from the medical data records.”¹⁸⁸

13 Next, CCGroup disputes that the Cave Grouper performs step “(d) grouping the validated
14 at least one of a plurality of data records to an episode treatment category based upon the
15 predefined relationship, each episode treatment category having a dynamic time window defining
16 a time period which validated at least one of plurality of data records may be grouped to an
17 episode treatment category.”¹⁸⁹

18 Here, CCGroup argues that the Cave Grouper does not group claim data to an “episode
19 treatment category” or use “dynamic time windows” to determine which episode treatment
20 category a claim data record will be assigned.¹⁹⁰ Rather, CCGroup argues that since the Cave
21 Grouper forms episodes of care and an episode of care is different from an episode treatment
22 category, the Cave Grouper does not use an episode treatment category.¹⁹¹ As construed by the
23 Court, an episode treatment category is a classification that includes one or more episode

24 ¹⁸⁵ Id.

25 ¹⁸⁶ Phillips v. AWH Corp., et al., 415 F.3d 1303, 1312-1324 (Fed. Cir. 2005).

26 ¹⁸⁷ See ‘079 Patent at 24:11-15.

27 ¹⁸⁸ Dkt. No. 168 at 32.

¹⁸⁹ ‘079 Patent at 38:55-61; ‘252 Patent at 30:49-55.

¹⁹⁰ See Dkt. No. 147-4 at 35-37.

¹⁹¹ Id.

1 treatment groups.¹⁹² An episode of care is a “group of all healthcare services provided to a patient
 2 for the diagnosis, treatment, and aftercare of a specific medical condition(s) within a period of
 3 interest.”¹⁹³ Both parties agree that the Cave Grouper forms episodes of care and an episode
 4 treatment category is not the same as an episode of care.¹⁹⁴ However, CCGroup argues that the
 5 Cave Grouper does not group data records to an episode treatment category which necessarily
 6 requires grouping claims data to a “group of medical conditions.”¹⁹⁵ OptumInsight contends that
 7 what CCGroup calls a “medical condition” in the Cave Grouper is properly viewed as an episode
 8 treatment group.¹⁹⁶ Under the Court’s construction, a single episode treatment group may
 9 constitute an episode treatment category. Thus, the data records are grouped to an episode
 10 treatment category (the mechanism by which claims data records are grouped), as opposed to an
 11 episode of care, which is the final product resulting from the operation of the claimed process.¹⁹⁷

12 CCGroup also argues that the Cave Grouper does not use a “dynamic time window” to
 13 group data records to an episode treatment category.¹⁹⁸ OptumInsight argues that a “dynamic time
 14 window” is performed by the Cave Grouper when forming episodes of care for acute conditions,
 15 as confirmed by CCGroup’s corporate representative, who testified that “[e]ach medical condition
 16 acute has a certain predefined duration of days window period” assigned by CCGroup.¹⁹⁹ The
 17 Court has construed that “dynamic time window” shall mean “a time period that can reset based
 18 upon receipt of related claim records within a predefined time period.”²⁰⁰ CCGroup distinguishes
 19 the Cave Grouper by reading the claim limitation as requiring “the use of dynamic time window to
 20 select or alter an episode treatment category.”²⁰¹

21
 22
 23¹⁹² See Dkt. No. 92.

24¹⁹³ Dkt. No. 92 at 24.

25¹⁹⁴ See Dkt. No. 169 at 34.

26¹⁹⁵ Dkt. No. 189-4 at 21-22.

27¹⁹⁶ Dkt. No. 169 at 33-36.

28¹⁹⁷ Id.

¹⁹⁸ See Dkt. No. 189-4 at 24.

¹⁹⁹ See Dkt. No. 169 at 36-37; see also SB Ex. 29 at 50:7-12.

²⁰⁰ Dkt. No. 92 at 22.

²⁰¹ Dkt. No. 147-4 at 35.

Again, the Court looks to the intrinsic evidence because it is the primary source for determining the meaning of a claim.²⁰² The dynamic time window feature of the claim was discussed in the file history of the '079 Patent.²⁰³ Specifically, in an amendment dated January 25, 2002, the applicant explained how the process of "grouping validated data records to episode treatment category" and the dynamic time window" were implemented in the Seare Patents.²⁰⁴ OptumInsight argues that this explanation makes it clear that the episode treatment category has an associated dynamic time window and that dynamic time window is used to group claims data associated with the episode treatment category.²⁰⁵ This Court must walk the fine line of using the specification to interpret the meaning of a claim without importing limitations from the specification into the claim.²⁰⁶ However, the claim language, when properly construed, a genuine issue of material fact existed as to whether accused Cave Grouper contained, literally, every limitation of properly construed claims of the Seare Patents, precluding summary judgment of noninfringement.

Accordingly, CCGroup's summary judgment for non-infringement is DENIED because the Court finds that there is a material factual dispute as to whether CCGroup's Cave Grouper directly infringes Claims 1 of the Seare Patents.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part OptumInsight's summary judgment. The Court DENIES CCGroup's summary judgment.

1. Court DENIES OptumInsight's summary judgment as to the invalidity of the '126 Patent.
2. Court DENIES OptumInsight's summary judgment as to the noninfringement of the '126 Patent.
3. Court DENIES OptumInsight's summary judgment as to the validity of the Seare Patents relating to the Cave Article.

²⁰² Phillips, 415 F.3d 1312-1324.

²⁰³ See SB Ex. 28 at ING00001559-68 at 4-7

²⁰⁴ See id.; see also Dkt. No. 169 at 37.

²⁰⁵ See Dkt. No. 169 at 37.

²⁰⁶ Phillips, 415 F.3d 1323.

4. Court GRANTS OptumInsight's summary judgment as to the validity of the Seare Patents relating to the Aetna Proposal.
5. Court DENIES CCGroup's summary judgment as to the noninfringement of the Seare Patents.
6. Court DENIES CCGroup's summary judgment as to the invalidity of the Seare Patents.

Dated: February 20, 2015

Dated: February 20, 2015


EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California